IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR
::::

Smt. Santosh Devi Upadhyay
vs
The State of Rajasthan & Ors.

S.B. CIVIL WRIT PETITION NO.29/2003 UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER : 2.7.2007

PRESENT
HON'BLE MR.PRAKASH TATIA,J.

Mr.SP Sharma,for the petitioner.
Mrs.RR Kanwar, Addl. GA.

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BY THE COURT :

Heard learned counsel for the parties.

By this writ petition, the petitioner is seeking direction against the respondents for grant of pension to the petitioner.

The petitioner's husband Shri Shyam Sunder Upadhyay S/o Shri Bhura Lal Upadhayay was posted on the post of Patwari at Tehsil Shahpura, District Bhilwara on 30th July, 1968 vide office order dated 22nd June, 1968 (Annex.1). When the petitioner's husband was posted at Tehsil Kotadi as Patwari in the year 1994, he went to attend his duties in the respondent department on 26th May, 1994, but he did not return back nor he reported to that place.

The petitioner's husband is missing since 26th May, 1994. A report was made to the Superintendent of Police, Bhilwara on 20th June, 1994. Ultimately, an FIR was lodged at Police Station Bigod, Bhilwara on 14.11.1994 about missing of the petitioner's husband, copy of which is placed on record as Annex.2. The police registered case under Section 364 IPC and after investigation, a final report was submitted by the concerned police officer. The matter was referred to the CID, CB Rajasthan, Jaipur for investigation. After investigation two persons named Ganesh S/o Laxman and Suresh Chandra S/o Nand Ram were suspected for kidnapping the petitioner's husband and, therefore, they were arrested. Both the accused persons were released on bail by the order of the learned Sessions Judge, Bhilwara on 1.3.2001. It is stated that since petitioner's husband did not report on duty, the employer of the petitioner's husband suspended him vide order dated 25th June, 1994 (Annex.4). A notice for joining duty was issued in the name of the petitioner's husband by the respondent no.2 on 30th June, 1995 asking him to join the duties, failing which he would be dismissed from the service. Ultimately, a charge-sheet was issued and since petitioner's husband did not appear, therefore, ultimately, after holding inquiry, the petitioner's husband's services were terminated vide order dated 5th Dec., 1996 (Annex.10). The petitioner's husband was not found thereafter also and yet not found despite all efforts.

The contention of the petitioner is that petitioner was entitled to family pension with the expiry of one year only as per the Rule 268B of RSR and second proviso to Rule 61 of the Rules of 1996, which provides that if a Government servant is unheard of for more than a period of one year, the family pension shall be sanctioned to the member of his/her family as defined under Rule 66(1) on submission of an application alongwith indemnity bond by the applicant in the prescribed form 16,16-A and 16-B and also a copy of the FIR lodged with the Police about the dis-appearance of the Government servant. The petitioner's another contention is that petitioner's husband was entitled to pension as he can be presumed to be dead in view of Section 108 of the Indian Evidence Act, which provides that if a person is not found or unheard for more than seven years, then he can be presumed to be dead, therefore, petitioner's husband died when he was in service and, therefore, he was entitled to pensionary benefits and all those pensionary benefits should have been granted to the petitioner, who is wife of the employee. Learned counsel for the petitioner submitted that the matter is squarely by the decision of this Court delivered in the case of Smt. Manohar Kanwar & Anr.Vs. State of Rajasthan & Ors reported in 2007(2) CDR 1044 (Raj.)

Learned counsel for the respondents submitted that the respondents received one communication from one lady claiming herself to be the wife of the deceased employee Shri Shyam Sunder

Upadhyay. It is also submitted that petitioner's husband's services were terminated after holding an inquiry is an admitted fact, therefore, the petitioner's husband was not entitled to pensionary benefits and consequently, the petitioner is also not entitled to any pensionary benefits. It is also submitted that the petitioner has not challenged the order of termination of service of her husband – the employee and, therefore also, she is not entitled to any relief from this Court in this writ petition without challenging the oder of termination. Learned counsel for the respondents further pointed out even the employee Shri Shyam Sunder Upadhyay's own son Laxmikant Upadhayay informed the District Collector, Bhilwara vide his letter dated 27.2.2007 (Annex.R/2) that there is possibility of hiding the said employee Shri Shyam Sunder Upadhyay by none else than the petitioner herself. He also pointed out that he has two brothers and three sisters and his mother is residing separate from them and living with another person, therefore, the petitioner is not entitled to any pensionary benefits.

I considered the submissions of the learned counsel for the parties and perused the relevant documents placed on record. This fact is not in dispute that petitioner's husband was first appointed on the post of Patwari and he joined his duties on 30th July, 1968. It is also not in dispute that he is missing since 26th May, 1994 and FIR was lodged and, thereafter, inquiry was conducted by the CID and even then the petitioner's husband was not found. He has not

found till today. In view of the detailed judgment of this Court in identical facts and circumstances delivered in the case of Smt.Manohar Kanwar & Anr. (supra), the respondents could not have denied the family pension to the petitioner under Rule 268B of RSR provided she complied with other conditions. So far as order of termination of services of the petitioner's husband is concerned, that on the face of it is void as the same has been passed against a person, who admittedly, could not have received the notice as he was found missing since 26th May, 1994 and, therefore, the order against the dead person is nulity. With the expiry of seven years from 26th May, 1994, the respondents should have drawn inference of civil death of the petitioner's husband. Therefore, the petitioner or any other claimant entitled to benefits in accordance with law for the services renderd by the petitioner's husband became entitled to that benefit of deceased employee after seven years from the date of missing of the said employee Shri Shyam Sunder Upadhyay. The respondents, therefore, have committed error of law in denying the pensionary benefits to the claimant, who may be entitled to the retrial benefits of the deceased Shri Shyam Sunder Upadhyay.

The contentions of the respondents that none else than the son of the petitioner herself had doubted that the petitioner may be involved in hiding the said employee Shri Shyam Sunder Upadhyay and there is a claim of another lady are not very much relevant for the purpose of deciding the issue that if the employee is not heard

of for more than one year, the family member is entitled to family pension or not and said objections are also not relevant for the purpose of deciding that whether persumption can be drawn about civil death of employee under Section 108 of the Evidence Act. If there is a dispute inter se between the parties, then that is required to be decided by the respondents in accordance with law and after giving opportunity of hearing to the parties. Mere raising of objection itself is not sufficient to deny any relief to any party. If there is an objection then it is required to be considered and after considering the objection, appropriate order can be passed.

In view of the above discussions, this writ petition deserves to be allowed, hence allowed and it is held that Shri Shyam Sunder Upadhyay was not found since 26th May, 1994 and after more than one year, his wife or any claimant in accordance with law are entitled to pension benefits as per rules. It is also held that after expiry of seven years from the date of Shri Shyam Sunder Upadhyay's missing i.e., from 26th May, 1994, (the starting date), the family members of the employee became entitled to pensionary benefits as per law and in proportionate and in the manner as provided under the relevant rules. So far as objection of other claimants are concerned, they may also be considered by the respondent – department and, thereafter, appropriate orders will be passed.

Since it is a matter of pension and that too, in relation to an

employee, who is missing since 26th May, 1994, therefore, the respondents are directed to decide the case of the claimant – petitioner for the pensionary benefits in accordance with law treating the lawful claimant to be entitled to the pensionary benefits and the respondents shall not deny the benefits to the legal claimant on the basis of alleged termination of services of Shri Shyam Sunder Upadhyay – employee or merely because some one has raised objection. The matter be considered and decided within a period of three months from the date of receipt of the certified copy of the order, which may be supplied by the petitioner to the respondents.

(PRAKASH TATIA), J.

c.p.goyal/-